No. 85-793

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT SUPPLEMENTAL BRIEF FOR PETITIONER MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

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ARGUMENT

The Court, by order entered December 1, 1986, has invited supplemental briefs addressing the question whether the United States Court of Appeals for the District of Columbia Circuit had jurisdiction of the unions' petitions for review of the Interstate Commerce Commission's order of May 18, 1983 (denying the petition for clarification of respondent Brotherhood of Locomotive Engineers ("BLE")) in view of 28 U.S.C. § 2344, 49 U.S.C. § 10327(i) and the passage of more than 60 days from service of the May 18 order and the filing of the petitions for review in the Court of Appeals.

Petitioner Missouri-Kansas-Texas Railroad Company ("MKT") and respondents Union Pacific Railroad Company ("UP") and Missouri Pacific Railroad Company ("MP") respectfully submit that the court of appeals did *not* have jurisdiction to review the May 18, 1983 order of the Interstate Commerce Commission ("ICC" or "Commission").

I. The Relevant Jurisdictional Statutes Provide That Petitions For Review Filed More Than 60 Days Following May 18, 1983, Could Not Properly Bring Before The Court Of Appeals The ICC Order Served On That Date.

A. Relevant Statutes

The Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. § 2344, requires that, for jurisdiction to vest in a competent court, the petition seeking review must be filed within 60 days of the entry of the final order of which review is sought:

> On the *entry* of a *final order* reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the *final order may*, within 60 days after its entry,

> file a petition to review the order in the court of appeals where venue lies.

28 U.S.C. § 2344 (emphasis added).

The provision of the Interstate Commerce Act addressing "Commission action and appellate procedure in rail carrier proceedings" provides:

> (i) Notwithstanding this subtitle, an action of the Commission under this section . . . *is final on the date on which it is served*, and a civil action to enforce, enjoin, suspend or set aside the action may be filed after that date.

49 U.S.C. § 10327(i) (emphasis added).

B. Application To This Case

The order denying BLE's petition for clarification was served on May 18, 1983. It became final on that date pursuant to 49 U.S.C. § 10327(i). The 60 day limitations period commenced on that date pursuant to 28 U.S.C. § 2344 and expired on July 17, 1983. The BLE and the United Transportation Union ("UTU") did not file petitions for review until five months later (on December 16 and December 23 respectively).

The Hobbs Act is jurisdictional in nature. As the D.C. Circuit had itself previously held: "It is beyond cavil that these limitations are jurisdictional." *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 389 (D.C. Cir. 1974); *accord Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir.), *cert. denied*, 105 S. Ct. 3513 (1985); *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 672 (8th Cir.), *aff'd en banc*, 735 F.2d 1059 (8th Cir. 1984); *Illinois Central Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983); *Pennsylvania v. ICC*, 590 F.2d 1187, 1193 (D.C. Cir. 1978).[1]

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[1] Furthermore, Rule 26 of the Federal Rules of Appellate Procedure denies to the reviewing court the authority to "enlarge the time pre-

On the face of the statutes,[2] therefore, "it is beyond cavil" that the court of appeals could have no jurisdiction to entertain petitions for review once the 60th day following May 18, 1983, had passed (or after July 17, 1983).

II. The Legislative History Of The 4-R Act Supports The Unambiguous Language Of The Jurisdictional Provisions.

Section 10327(i) was originally adopted as part of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. No. 94-210, 90 Stat. 31 (1976).

Section 303 of the 4-R Act, 90 Stat. 48 (later codified as 49 U.S.C. § 10327) established a new statutory regime for Commission practice and procedure, including appellate procedure. The pertinent Senate report[3] sets forth both the general purposes of the new procedures and the import of specific provisions:

> Not only is there a need to change the substantive standards by which the Commission regulates railroads, but to improve the regulatory

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scribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States." Fed. R. App. P. 26(b).

[2] During oral argument, counsel for the ICC suggested that the word "may" in 49 U.S.C. § 10327(i) rendered that provision somehow permissive or advisory. Of course, the diction in the Hobbs Act is, in this respect, identical. The use of the word "may" therein does not render the Hobbs Act limitations period any less mandatory and jurisdictional. The word obviously means that an aggrieved party may, or may not, seek review at all. It does not mean that a party may seek review within the prescribed period or that it may do so at some later date.

[3] The regulatory reform section was originally adopted by the Senate, in S. 2718, on December 4, 1975. S. 2718, 94th Cong., 1st Sess., 121 Cong. Rec. 38492 (1975). Although various modifications occurred during the ensuing legislative process, the "final order" provision of S. 2718 remained intact; hence, the Senate report on S. 2718 is authoritative.

> process. There are presently grave limitations upon the ability of the Commission to properly perform its regulatory functions. There are presently restrictions upon the effective date of Commission orders which prohibit prompt responses to emergencies, guarantees of "administrative due process" which often add nothing to the quality of the record on which the Commission must base its decisions but which add greatly and unnecessarily to the length of Commission proceedings, and inflexible general proceeding rules which do not easily adjust to the nature of particular proceedings. These all add up to excessive regulatory delay and erode the confidence of the public in needed regulation. This bill attempts to ease these problems by revising Commission procedures in both specific and general cases to help expedite the regulatory process.

S. Rep. No. 499, 94th Cong., 1st Sess. 1, 15 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 29.

In the section-by-section analysis pertinent to the provision in issue here, the report explained:

> This section expedites Commission procedures by modifying section 17, which contains procedural requirements affecting all formal Commission proceedings. Four subsections of this section (17(5)-17(9)) are substantially rewritten. These subsections were enacted in their present form by the Transportation Act of 1940, and with the exception of the last sentence of subsection 17(5) (added in 1961), this section remains the same today. Since 1940, administrative proceedings have grown increasingly complex. In 1947, the Administrative Procedure Act was enacted and now controls the procedures of most government agencies. However, section 17 continues to gov-

> ern ICC procedures, and since its requirements are in several respects considerably more extensive than those contained in the APA, *section 17 in its present form has contributed substantially to unnecessary regulatory lag.*
>
> . . . .
>
> *Section 205 provides for procedural reforms which will expedite Commission proceedings and reduce regulatory lag.*

Id. at 60, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 75 (emphasis added).

Floor debate was somewhat sparse, but the comments of the legislation's proponents similarly reflect Congress' intent to bring expedition and finality to rail carrier proceedings. In support of the original Senate bill, Senator Beall offered the following comment on regulatory reform:

> Title I, II and IV reform the regulatory agency, the Interstate Commerce Commission. One example is the streamlining of railroad mergers and rationalizations in order to avoid situations like the Rock Island case which dragged out for over a decade.

121 Cong. Rec. 38446 (1975). *Accord id.* at 42208 (remarks of Senator Beall, a conferee, in support of Conference Committee bill).

In the House, Representative Rooney, Chairman of the Subcommittee on Transportation and Commerce, urged support of the final Conference bill (which included the final order language of S. 2718), stating:

> The second area of this reform addresses the Interstate Commerce Commission which is our oldest, and many think our slowest agency. The bill places strict time limits on procedures so we do not have 12-year mergers like the Rock Island

> that eventually fail; so that we do not have procedures so cumbersome and time lags so great that they cost the rail industry billions of dollars and bring the railroads to collective bankruptcy.

122 Cong. Rec. 1352 (1976).

The legislative history of the 4-R Act, as demonstrated by congressional reports and congressional debate, thus reveals a general legislative purpose to reform the regulatory procedures of the ICC in an effort to eliminate harmful regulatory lag. The purpose of those provisions was to speed up ICC processes by streamlining ICC procedures and by defining specific time-limits for ICC actions.

Therefore, the legislative history of section 10327(i) confirms that the statute means what it says—that a Commission action is final when served. Only by honoring the plain meaning of section 10327(i) can the purpose and intent of the legislature, bringing expedition and finality to ICC procedures, be accomplished.

III. Analogous Case Law Likewise Supports The Unambiguous Language Of The Jurisdictional Statutes.

We have found no judicial decisions authoritatively construing 49 U.S.C. § 10327(i). However, a decision of the United States Court of Appeals for the Tenth Circuit, addressing the limitations period established by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136(a)-136(y), holds that its 60-day period for seeking review is conclusive and is not tolled by the filing of a petition for reconsideration. *Selco Supply Co. v. EPA*, 632 F.2d 863 (10th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). The FIFRA provision, 7 U.S.C. § 136n(b), is much less stringently worded than the 4-R Act provision in issue here. It does not, for example, contain the finality declaration set forth in 49 U.S.C. § 10327(i)

and more closely resembles the Hobbs Act's more general provision.[4] Nevertheless, the *Selco* court held:

> The grant of exclusive jurisdiction in the court of appeals is intended to ensure prompt resolution of the validity of EPA orders. . . . The time limits for judicial review of actions taken under environmental protection statutes provide a statute of limitations which bars late filings.

632 F.2d at 865 (citations omitted).

The congressional mandate for finality, expedition and the elimination of regulatory lag in the 4-R Act is surely no less forceful than similar policies underlying the environmental laws. The *Selco* court noted petitioner's argument that EPA regulations provided for petitions for reconsideration (as do the ICC's regulations), but said:

> The difficulty is that the statute, 7 U.S.C. § 136n(b) requires that a petition for judicial review be filed within 60 days after the entry of the order, and contains no provision for tolling by a motion for reconsideration. Federal courts may exercise only that judicial power provided by the Constitution and conferred by Congress.

Id. (citations omitted). The *Selco* court also cited "[d]ecisions under other federal statutes permitting tolling of the limitation period," but characterized those decisions as "not pertinent" to the statute it was construing. *Id.* (citing, *inter alia, B. J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1114 (8th Cir. 1977), dealing with the Interstate Commerce Act). Neither *McAdams* nor the other cases are pertinent here either. *McAdams*, a decision reviewing the ICC's regulation of motor carriers, had nothing to do with

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[4] The court characterized the statute as requiring the filing of a petition within 60 days even though the statute also used the word "may." *See supra* note 2.

the 4-R Act special provision relating to "[C]ommission action and appellate procedure in rail carrier proceedings." 49 U.S.C. § 10327.

Similarily, none of the cases proffered by the ICC in its supplementary submission to this Court[5] implicated 49 U.S.C. § 10327(i), and neither of the two decisions of this Court invoked by the ICC is apposite. *Bowman v. Loperena*, 311 U.S. 262 (1940), was a bankruptcy case that did not even involve the Hobbs Act, much less the 4-R Act. *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), which at least involved the review of an ICC order (but did not involve a rail carrier proceeding and antedated the 4-R Act), dealt with an entirely different issue: whether the filing of an action seeking judicial review of an ICC order disabled the Commission from granting a timely filed petition for rehearing.

The only conceivable relevance of *American Farm Lines* is the majority's citation with approval of *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960), as follows:

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[5] Letter dated November 14, 1986 of Henri F. Rush, Deputy General Counsel ICC. We would have no quarrel with the ICC's submission if it had included one qualification (shown in brackets in this quotation from Mr. Rush's letter):

> [A] timely petition may, where. . . the agency does then consider on the merits the matter on which reconsideration has been sought [and does alter its prior decision on reconsideration], cause the running of the time to petition for review to begin after such reconsideration. . . .

As the D.C. Circuit held in *Microwave*:

> It has long been settled that an order which merely denies rehearing of another order is not itself reviewable.

515 F.2d at 387 n.7. The fact that the ICC may have thought about the merits, or discoursed on them at length in an opinion accompanying an order totally denying reconsideration, cannot alter the character of that ultimate order.

> *Unless Congress provides otherwise,* "[w]here a motion for rehearing is in fact filed there is *no final action* until the rehearing is denied." [Citing *Outland*].

397 U.S. at 541 (brackets in original, emphasis added).

The mere citation of the Court's statement, however, begs the question, which is: Has Congress provided otherwise? We submit that section 10327(i) does provide otherwise; it states in unequivocal terms that there *is* "final action" upon the service of the original order.

As noted, none of the other cases cited by the ICC were decided under this provision of the 4-R Act. Even those cases, however, show that the inquiry always turns on the intent of Congress, which is the fount of federal court jurisdiction. Thus, while the Tenth Circuit applied the rule sought by the ICC in one case that it cites, *C.O.D.E., Inc. v. ICC*, 768 F.2d 1210 (10th Cir. 1985), it expressly disclaimed any principle of universal applicability, noting that it had previously declined to apply such reasoning in *Selco*. *Id.* at 1212. The Tenth Circuit recognized that Congress deemed finality and expedition important in cases arising under the environmental laws—just as Congress in the 4-R Act deemed finality and expedition important in railroad reorganization cases.

Additionally, even though the courts of appeals cases cited by the ICC are not on point because they involve either different statutes or different provisions of the Interstate Commerce Act, their rationale may not properly be applied to this case. They are all progeny of the *Outland* holding that, in pursuit of the laudable goals of judicial economy and efficiency, there could be no "final action" until the agency determined any pending petitions for rehearing or reconsideration. 284 F.2d at 227-28. The flaw in applying that reasoning here is that the power to establish federal court jurisdiction is entrusted by the Constitution of the United States to the Congress. The courts

may not create their own jurisdiction, whether to achieve judicial economy and efficiency, or for any other purpose, however praiseworthy.[6]

Finally, we note that the same Court of Appeals that improperly accepted jurisdiction of this case has "previously admonished petitioners of the wisdom of filing protective petitions for review during the statutory period." *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 912 (D.C. Cir. 1985). The unions here disregarded that advice, failing to file their petitions until approximately seven months after the order under review became final.

CONCLUSION

For the foregoing reasons, petitioner MKT and respondents UP and MP respectfully submit that this Court should reverse the decision below and remand to the Court of Appeals with instructions to vacate its opinion below and dismiss the petitions for lack of jurisdiction.

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[6] We note also that no impediments to judicial economy and efficiency are created by the provisions of the Hobbs Act and the 4-R Act at issue here. As appears in the record below, the D.C. Circuit requires, in all administrative agency review proceedings, a Docketing Statement that inquires, *inter alia*: "Is a request for rehearing or reconsideration pending at the agency." Thus informed, the court can, if it chooses, delay action on a timely filed petition for review to permit the Commission to cure any alleged defects in its order.

Respectfully submitted,

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